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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 983

BUCK WILLCOXSON, *Petitioner*,

v.

UNITED STATES OF AMERICA, STEWART UDALL, As Secretary of the Interior, and KERR-McGEE OIL INDUSTRIES, INC., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOHN H. PICKERING
616 Transportation Building
Washington 6, D. C.

JOHN D. ROBB
First National Bank Building
Albuquerque, New Mexico

Counsel for Petitioner

April 3, 1963

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UNITED STATES OF AMERICA, STEWART UDALL, As Secretary of the Interior, and KERR-McGEE OIL INDUSTRIES, INC., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Buck Willcoxson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in these actions January 4, 1963.

OPINIONS BELOW

The opinion of the District Court is unreported and appears at R. 195.[1] The opinion of the Court of Appeals,

[1] "R." references are to the Joint Appendix in the court below and the proceedings in that court which have been filed as the certified record. Nine copies of that Joint Appendix have been filed with this Petition.

affirming the decision of the District Court, is not yet officially reported, and appears at R. 202-10 and App. 1a-8a.[2]

JURISDICTION

The judgment of the Court of Appeals was entered January 4, 1963. (R. 211, App. 9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, after public land has been ordered into market and sold, pursuant to Rev. Stat. § 2455 (43 U.S.C. § 1171), first enacted in 1846, and the purchaser has paid the purchase price and been declared to be the purchaser, the Secretary of the Interior (the Secretary) in reliance on a regulation first promulgated in 1944 (43 CFR 250.5) may cancel the sales on the basis of a subsequent mineral classification, where decisions of this Court for more than a century have declared as the law that a purchaser who has paid the price of public lands at a regularly held cash sale has thereby acquired equitable title to the lands which the Government may not challenge on the basis of such subsequent events.

STATUTE AND REGULATION INVOLVED

The statute involved is the "Isolated Tracts Act", § 2455 of the Revised Statutes, as amended, 43 U.S.C. § 1171 (1958), which provides in pertinent part:

> "SEC. 2455. Notwithstanding the provisions of section 2357 of the Revised Statutes (U.S.C., title 43, sec. 678) and of the Act of August 30, 1890 (26 Stat. 391), it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land

[2] "App." references are to the Appendices to this Petition.

office of the district in which such land may be situated: *Provided*, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: . . ."

The regulation involved is 43 CFR 250.5 (Revised, 1954):

"§ 250.5. *Effect of application.* The filing of an application in conformity with the regulations in this part will not segregate the lands applied for from other application under the public land laws, or defeat a prior valid right initiated under any such law. However, until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States."

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals in three cases which were consolidated in that Court and in the District Court. The judgment affirms the judgment of the District Court declaring: (1) that petitioner acquired no rights in two small tracts of land which he purchased from the United States in public sales held in November of 1953 and that the Secretary, therefore, was entitled to cancel those sales in 1956; (2) that since petitioner acquired no interest in the land, he had no rights against Kerr-McGee Oil Industries, Inc. (Kerr-McGee) which commenced mining one of the two tracts under mining claims located after the sales; and (3) that the rights of Kerr-McGee as against the United States were not mature for determination. (R. 198, R. 211, App. 9a).

The litigation arose under undisputed facts as follows:

In September of 1952, petitioner, a New Mexico rancher, filed in the Land and Survey Office of the Bureau of Land Management at Santa Fe, New Mexico, applications for the sale of two isolated tracts of land located in that state which adjoined his range holdings (R. 64, 123). In November and December of 1952, the Manager of the Santa Fe office received reports appraising the land and finding it to be without value for minerals other than oil and gas, (R. 112, 115, 124, 125). The November reports recommended that, since it is in the public interest to dispose of these lands the application[s] be approved and the lands be offered in public sale." Accordingly, the Manager issued orders for "public sale" of the lands which stated that they "will be sold", subject to reservation of oil and gas and fissionable materials. (R. 65, 127).[3] Public sales of the two tracts were held on November 16 and 17, 1953. (R. 66, 129). The sale proceedings were regular in all re-

[3] Oil and gas were reserved because of the reports that the lands had value for those minerals. Fissionable materials were reserved, although the tracts were reported to be without value for them, because § 5(b)(7) of the Atomic Energy Act of 1946, 60 Stat. 762, then required that fissionable materials be reserved in all disposals of the public domain. That requirement was later eliminated by the Act of August 13, 1954, 68 Stat. 716, and § 68.b of the Atomic Energy Act of 1954, 68 Stat. 934, which provided for the release of existing reservations upon application of the holders of the lands subject thereto. Subsequently, Congress quitclaimed all such reservations to the persons entitled to the lands, Act of August 19, 1958, 72 Stat. 632, 42 U.S.C. § 2098(b) (1958). All of this was done pursuant to recommendations of the Atomic Energy Commission which advised that such reservations had proved to be of no value to the United States and that it was not thereby "giving up any valuable rights". See S. Rep. No. 1610, 83d Cong., 2d Sess., pp. 5, 7; S. Rep. No. 1699, 83d Cong., 2d Sess., p. 18; H.R. Rep. No. 2181, 83d Cong., 2d Sess., p. 18; and Hearings on the AEC "Omnibus" Bill before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 85th Cong., 2d Sess., pp. 2, 7.

specs and were held in full compliance with the applicable law and regulations. (R. 166, 173).

Petitioner paid for the lands and received receipts for the "Purchase Money" (R. 33, 141). After completion of the proceedings required by statute and regulations, including the adjustment of competing preference rights, petitioner was declared the "purchaser" of part of one tract on February 17, 1954, and of part of the other on January 31, 1955. (R. 130, 80). Petitioner had by then complied with the requirements of the statute and regulations and had done all that he was required to do to purchase the lands. Accordingly, everything was in order for the issuance of documents called cash certificates. (R. 80-81, 131).[4] Nevertheless, as the court below noted, while "the Manager could properly have issued cash certificates to Willcoxson, he did not do so because of a heavy backlog of work in the Santa Fe Land Office." (App. 4a).

After some months passed without the issuance of the cash certificates, petitioner inquired in May of 1955 when he would get them, and also advised the Manager that uranium prospectors were on the tracts. Relying on 43 CFR 250.5, and the fact that cash certificates had not been issued, the Manager informed petitioner that "action on these two applications has been suspended pending receipt of a report . . . as to the mineral character of the land." (R. 83). In January and February 1956, on the basis of field examinations made in December 1955, the Bureau staff reported to the Manager that "the subject land is potentially valuable for uranium." It recommended "that the

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[4] Such certificates—called cash certificates in cash sales and final certificates in other entries such as homestead, etc.—are not documents which create rights. As this Court has said, they are simply papers to which a claimant is "entitled" when he "acquires a vested interest" in public lands. *The Yosemite Valley Case*, 15 Wall. 77, 87 (1873)—they furnish "*prima facie* evidence of an equitable claim upon the Government for a patent . . . ". *Guaranty Savings Bank* v. *Blatlow*, 176 U.S. 448, 454 (1900).

land be classified as mineral in character . . ." and that the sales be canceled and the applications rejected. (R. 93, 122, App. 4a).

In decisions of April 12, 1956, the Manager declared that, "as a result of the re-examination, the subject land has been classified as mineral in character and prospectively valuable for uranium"; and concluded that, since mineral lands may not be sold, and inasmuch as cash certificates had not issued, the sales were "null and void." (R. 87, 136). The Bureau of Land Management and the Secretary of the Interior affirmed. (R. 94, 138, 96).

Three suits were thereafter instituted. First, petitioner filed an action against the Secretary to require him to set aside the cancellation of the sales and issue cash certificates; jurisdiction was founded on 28 U.S.C. §§ 1331 and 1332, and Kerr-McGee, the mining claimant, intervened as a defendant. Next, petitioner sued the United States under the Tort Claims Act (28 U.S.C. § 2674) for damages arising from the cancellations, jurisdiction being founded on 28 U.S.C. § 1346(b). Finally, the United States instituted its own action against petitioner and Kerr-McGee, jurisdiction being founded on 28 U.S.C. § 1345. By that action the United States sought a declaration that petitioner had no rights in the lands and an injunction prohibiting him from asserting any rights. The Government also asked for determination that the claims of Kerr-McGee were not ripe for adjudication against the United States and for an adjudication of the rights of petitioner and Kerr-McGee as against each other. In that action petitioner cross-claimed against Kerr-McGee for the value of minerals removed.

The three cases were consolidated by the District Court and decided on cross-motions for summary judgment. By its judgment, the District Court dismissed with prejudice the two actions brought by petitioner (and his cross-claim against Kerr-McGee) and determined that petitioner had

no rights in the two tracts of land as against the United States. (R. 198). Petitioner took a timely appeal to the court below. (R. 200). That court, after stating the case generally as set forth above, affirmed, holding that § 250.5 of the public sale regulations was valid and applicable, and that, accordingly, petitioner had no rights in the lands in the absence of cash certificates and the sales could therefore be canceled on the basis of the subsequent mineral classification of the lands. (R. 202; App. 1a).

REASONS FOR GRANTING THE WRIT

In upholding cancellation of the sales, the court below has decided an important federal question in a way which conflicts with long-standing applicable decisions of this Court. Moreover, the decision below sanctions mischievous results in the administration of one of the principal land disposal statutes, by allowing substantial property rights to depend upon purely fortuitious administrative circumstance or whim, with the inequitable result in this case that petitioner is losing to subsequent mining claimants the lands he paid for and was declared purchaser of.

I

For more than a century—beginning with *Carroll* v. *Safford*, 3 How. 441, decided in 1844, and extending through *Wyoming* v. *United States*, 255 U.S. 489, decided in 1921—the decisions of this Court have repeatedly and unqualifiedly laid down the rule that when a purchaser of public lands pays the price, the equitable title thereupon passes to him, and, pending the issuance of a patent conveying the legal title, the United States holds only the naked legal title in trust for him and is without power to avoid the transaction in the light of hindsight. That "general rule of real-estate law" has been "repeatedly applied . . . to the administration of the affairs of the Land Department of the government; and the ruling has been uniform that *whenever, in cash sales, the price has been paid*, or, in other

cases, all the conditions of entry performed, *the full equitable title has passed*, and only the naked legal title remains in the government, in trust for the other party, in whom are vested all the rights and obligations of ownership." *Benson Mining Co.* v. *Alta Mining Co.*, 145 U.S. 428, 432 (1892) (emphasis added).[5]

The holding below—that the Secretary may by regulation defer the vesting of rights until such time, if ever, as he decides to issue cash certificates—squarely conflicts with this settled line of decisions by this Court. Those decisions are applicable and controlling, even though they did not specifically involve the Isolated Tracts Act, for they decided the scope of rights under the general statutory scheme for cash disposal of the public lands of which that Act is an integral part. They cannot, therefore, be distinguished on the ground that "they arose under statutes different from the Isolated Tracts Act." (App. 6a). Equally unsound was the effort below to distinguish *Wyoming* v. *United States*, *supra*, on the ground that a different *method* of disposal was involved there. As the opinion in *Wyoming* makes clear, the difference in the method of disposal makes no difference in the legal result.

A. A brief review of the cash sale system and the place of the Isolated Tracts Act in it focuses the conflict sharply. The cash sale system of public land disposal is nearly as old as the country itself. Prior to general legislation in 1820, Congress from time to time authorized sales of public land, to be held as directed by proclamation of the President.[6] In 1820, Congress established the general

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[5] Other illustrative cases include: *United States* v. *Hughes*, 11 How. 552, 568 (1850); *Witherspoon* v. *Duncan*, 4 Wall. 210, 219 (1866); *Atherton* v. *Fowler*, 96 U.S. 513, 518 (1878); *Simmons* v. *Wagner*, 101 U.S. 260, 261 (1880); *Cornelius* v. *Kessel*, 128 U.S. 456, 460-61 (1888).

[6] See, *e.g.*, Act of March 26, 1804, § 5, 2 Stat. 279, authorizing the sale of lands in the Indiana territory by public auction at such time as the President should designate by proclamation.

framework of the cash sale system. Act of April 24, 1820, 3 Stat. 566. The essentials of that system were:

First. The scheme depended upon the issuance of a proclamation by the President ordering particular blocks of land into market to be "offered" to the highest bidder at public sales. It was discretionary with the President when to proclaim lands for sale,[7] and until he had exercised his discretion to do so, the public lands were "unoffered" and, absent special legislation, were not available for disposal. *Moore* v. *Robbins*, 96 U.S. 530, 538 (1878).

Second. When the President exercised his discretion by ordering lands into market for sale at public auction, and the auction was held and the price paid by the high bidder, that bidder acquired an equitable title which the United States could not, except for extraordinary reasons, such as fraud, defeat. *Moore* v. *Robbins*, *supra*.

Third. Lands which were offered but not sold at the public auctions were thereafter known as "offered" lands and became subject to sale by "private entry" through payment at the land office of the minimum price fixed by law. Here, also, as in the case of the public sales, the purchaser acquired equitable title when he paid the price. *Carroll* v. *Safford*, 3 How. 441 (1844).

Thus, there were two types of "cash entries" under the cash sale system—purchases at the public auctions, and purchases thereafter by private entry of the "offered" but unsold lands—and, as this Court has said, both "modes contemplated the immediate payment of the money, and the right of the party to the land was fixed when this was done. He then had a vested interest, which became a perfect legal title when he received his patent." *Atherton* v. *Fowler*, 96 U.S. 513, 518 (1878).

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[7] The statute authorized him to do so "whenever he shall think it convenient." Act of March 31, 1808, 2 Stat. 479, codified as Rev. Stat. § 2358 and continued as 43 U.S.C. § 684 until repealed as obsolete by the Act of December 16, 1930, 46 Stat. 1028.

The Isolated Tracts Act was enacted in 1846 as a part of this cash sale system. 9 Stat. 51. There was no difference between that Act and the general statutory scheme, except that the initial discretion whether to order lands into market was confided to the Commissioner of the General Land Office to avoid, in the language of the Act, "the formality and expense of a proclamation of the President" in the case of isolated tracts.[8] Accordingly, from the beginning, the executive officers charged with the administration of the Isolated Tracts Act recognized that sales under it were governed by the same rules and had the same consequences as cash sales under the general statutory scheme. Thus, the first regulation under the Act provided:

> "The sale must close immediately after offering the lands thus advertised; but should any of the lands thus offered not be purchased at the public sale, they must subsequently be regarded and treated as subject to private entry, as if offered by a Proclamation of the President". General Land Office Circular, January 18, 1851, reprinted in 4 Lester, *Land Laws, Regulations and Decisions*, (1860) p. 350.

And, until the issuance of the challenged regulation in 1944, the subsequent regulations of the Department of the In-

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[8] As originally enacted, the Act provided in pertinent part:

> "it shall and may be lawful for the Commissioner of the General Land Office to order into market, after due notice, without the formality and expense of a proclamation of the President . . . isolated or disconnected tracts or parcels of unoffered lands, which, in his judgment, it would be proper to expose to sale in like manner. . . ."

The Act still provides almost *in haec verba:*

> ". . . it shall be lawful for the Secretary of the Interior to order into market and sell at public auction . . . any isolated or disconnected tract . . . which, in his judgment, it would be proper to expose for sale. . . ."

See the present form of the Act, *supra*, pp. 2-3.

terior recognized that sales under the Isolated Tracts Act, as it was amended from time to time, were "ordinary cash entries", and directed the issuance of "cash papers as in ordinary cash entries".[9]

Thus, both the language of the Isolated Tracts Act (to allow sale "without the formality and expense of a proclamation of the President") and its contemporaneous and continuing administrative interpretation for almost a century, demonstrate beyond question that the Isolated Tracts Act is indistinguishable from the other parts of the cash sale system. Accordingly, the decisions of this Court, holding that equitable title vests on payment of the purchase price in cash sales of the public domain, are applicable here and cannot be brushed aside, as the court below attempted, on the ground that "they arose under statutes different from the Isolated Tracts Act." (App. 6a).[10]

B. An analysis of *Wyoming* v. *United States*, 255 U.S. 489 (1921), highlights the departure of the court below

[9] The regulations include: Circular of April 11, 1895, 20 L.D. 305; Circular of July 18, 1906, 35 L.D. 44; Circular of May 16, 1907, 35 L.D. 581; Circular of December 27, 1907, 36 L.D. 216; Circular of January 11, 1915, 43 L.D. 485; Circular No. 684 of April 16, 1920, 47 L.D. 382; Circular No. 684, revised February 25, 1926, 51 L.D. 357; Circular No. 684, revised April 7, 1928, 52 L.D. 340; Circular No. 684, revised November 23, 1934, 55 I.D. 76; 43 CFR 250.13 (1940 ed.).

The challenged regulation was first promulgated in 1944 as 43 CFR 250.7, 9 Fed. Reg. 8347.

[10] The apparent absence of any previous case specifically determining when rights vest in sales under the Isolated Tracts Act is not surprising. On the contrary, it would be surprising if there were such a case, in view of the settled cash sale rule laid down by this Court and the consistent administrative recognition that sales under the Isolated Tracts Act are ordinary cash entries. Not only is the 1944 regulation the Department's first departure from the cash sale rule, but, in addition, as stated in the Secretary's decision, this is the first case where the Secretary has utilized the regulation to attempt to defeat the equitable title of a regularly declared purchaser. (R. 100).

from settled law. There Justice Van Devanter, writing for a unanimous Court, treated the cash sale rule as so well settled that he relied upon it as the premise of an *a fortiori* conclusion that the Secretary could not, on the basis of subsequent knowledge of mineral value, cancel a land selection which the state had made. The case arose as follows:

Wyoming, like other states, had been granted sections 16 and 36 of each township for support of its schools. Subsequently, Congress had authorized any state, in case any of the land so granted should be included within a public reservation, to waive its right to that land, and select in lieu thereof other non-mineral, public land of equal acreage.

In 1907, a tract previously granted to Wyoming was included within a public reservation. In 1912, the state exercised its right to a lieu selection, filed all the documents necessary to waive its right to the land within the reservation, and selected another tract. In 1914, while the state's lieu selection was awaiting the required approval of the Commissioner of the General Land Office, the selected land was withdrawn from disposal as possible oil land. Therefore, when the Commissioner considered the state's selection in 1915, he refused to approve it, offering the state the alternative of selecting other lieu lands or taking only surface title to the selected lands. The state refused both alternatives, contending that it was entitled to the land selected in 1912. The Commissioner canceled the selection, and the United States thereafter commenced an action to quiet title in itself to the selected land. Dismissal of its bill by the District Court had been reversed by the Court of Appeals.

Justice Van Devanter stated that the question before the Court was whether the land officers had power to disapprove the state's selection despite the fact:

> "that the selection was lawfully made in lieu of the state-owned tract contemporaneously relinquished, and

> that nothing remained to be done by the state to perfect the selection. . . ." 255 U.S. at 496.

In the course of concluding that the Secretary could not cancel the selection because of the subsequent mineral withdrawal, Justice Van Devanter stated among other things:

> "The proposal for the exchange of land . . . came from Congress. Acceptance rested with the state. . . . It is not as if the selection was merely a proposal by the state which the land officers could accept or reject. They had no such option to exercise, but were charged with the duty of ascertaining whether the state's waiver and selection met the requirements of the congressional proposal and of giving or withholding their approval accordingly. The power confided to them was not that of granting or denying a privilege to the state, but of determining whether an existing privilege conferred by Congress had been lawfully exercised; in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the state in 1912." *Id.* at 496-97.

The court below seized upon this language as a basis for distinguishing *Wyoming* on the ground that the Isolated Tracts Act provides for "a wholly different method" of land disposal:

> "Instead of limiting the Secretary to 'action . . . judicial in its nature and directed to an ascertainment and declaration' of the validity of compliance with the statutory requisites for acquiring the right, [255 U.S.] at 497, Congress entrusted to the Secretary's discretion the initial decision whether or not to sell isolated tracts of the public domain." (App. 7a).

Unquestionably there are differences between the method of disposal under a statute like that involved in *Wyoming* and the method of disposal under a cash sale statute such as the Isolated Tracts Act. Under the *Wyoming* statute the initial discretionary decision whether to offer lands is

made by Congress, whereas in the case of the Isolated Tracts Act, Congress has delegated that discretion to the Secretary. And, under the *Wyoming* statute, it is Congress who offers the land to a qualified applicant, whereas under the Isolated Tracts Act it is the Secretary who offers land "to the highest bidder".

As *Wyoming* makes clear, however, those differences in method are not attended by a difference in legal result: when a claimant to public land has done all that is required of him—filed the proper documents under a statute like that involved in *Wyoming*, or paid the purchase price for land ordered into the market and offered under a cash sale statute like that involved here—he has acquired equitable title. Indeed, Justice Van Devanter went on to state explicitly that the same rights were created despite the difference in the *method* of disposal. Thus, the final reason given for the conclusion that Wyoming's selection could not be canceled was the following *a fortiori* proposition based on the cash sale rule:

> "Of course the state's right under the selection was precisely the same as if in 1912 it had made a cash entry of the selected land under an applicable statute; for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration. And yet it hardly would be suggested that the Commissioner or the Secretary on coming to consider the cash entry could do otherwise than approve it, if at the time it was made the land was open to such an entry and the amount paid was the lawful price.
>
> "The conclusion which we deem plain in principle is fully sustained by prior adjudications. In Benson Mining Co. v. Alta Mining Co., 145 U. S. 428, 431, which presented the question of when under the public land laws a right to the land becomes vested, it was said:
>
> "'When the price is paid the right to a patent immediately arises.'" *Id.* at 497.

Thus, the conclusion of the court below that the Secretary's discretion "whether or not to sell isolated tracts" con-

tinued after he had ordered the land into market for sale and offered it, had received the price, and had declared petitioner to be the purchaser, simply does not square with *Wyoming*.[11]

The view of the Court of Appeals that the proceedings were merely "auctions with reserve" simply begs the question.[12] For, it assumes as a premise that the Secretary—

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[11] Also wide of the mark, it is submitted, is the conclusion of the court below that the statement in *Wyoming*

> "if, when the claimant has done all that he is required to do to entitle him to receive the title, the land is not known to be mineral he acquires a vested right which no subsequent discovery of mineral will divest or disturb"

was limited in its application to "those statutes [in which] Congress chose a method of granting interests in public lands whereby the recipients of the grants had only to prove they met the statutory requirements in order to obtain rights in the lands." (App. 6a-7a). The court below reached that conclusion by emasculating the language of *Wyoming*. The above-quoted fragment reads, in full:

> "And *as respects cash entries* and entries under the pre-emption, homestead, desert land and kindred laws the Land Department always has ruled that if, when the claimant has done all that he is required to do to entitle him to receive the title, the land is not known to be mineral he acquires a vested right which no subsequent discovery of mineral will divest or disturb." 255 U.S. at 501. (Emphasis added).

[12] Moreover, the auctions were not in fact auctions with reserve. Section 27 of the Restatement of Contracts, relied upon by the court below, provides in relevant part:

> "At an auction, the auctioneer merely invites offers from successive bidders which he may accept or reject unless, by announcing that the sale is without reserve or by other means, he indicates that he is making an offer to sell at *any* price bid by the highest bidder."

The public notices of these sales so indicated, as appears from the following quotation from one, the other being identical except for land description, time of sale and minimum price (R. 65, 127):

> "Under provisions of section 2455 R.S. as amended by section 14 of the act of June 28, 1934 (48 Stat. 1274; 43 U.S.C.

despite the rule of law to the contrary—may postpone the time of vesting of equitable title. That is exactly what the Secretary sought to do—unsuccessfully—in *Wyoming*. It is what he seeks to do here.

This is not a case in which the Secretary simply waited a hundred years to exercise "otherwise valid regulatory power". (App. 6a, note 8). The whole teaching of those hundred years—in the decisions of this Court and the administrative construction of the Isolated Tracts Act—is that the Secretary does not have such power. The rule of *Wyoming*, *Benson Mining Co.* v. *Alta Mining Co.*, 145 U.S. 428 (1892), *Moore* v. *Robbins*, 96 U.S. 530 (1878), and the other cases cited *supra* at pages 7-8, is a rule of substantive law defining the legal relationship created when the claimant has done certain acts. The Secretary may not under the guise of regulation destroy that legal relationship; he may not abridge those rights which this Court has uniformly held to accrue to a cash entryman who has paid the purchase price for public land. If the substantive rules of law are to be changed, the task is for the Congress, not for the Secretary.[13] Thus, § 250.5 of the public sale regu-

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1171), and pursuant to the application of Buck Willcoxson, Serial No. NM09258, there will be offered to the highest bidder, but at not less than $4.00 per acre, at a public sale to be held at 11 o'clock a.m., on the 16th day of November next, at this office, the following tracts of land:"

Even in its pleadings below, the United States alleged that the land was "offered for sale" (R. 5, 6), and the decision of the Secretary affirming cancellation of the sales stated that the land had been "offered for sale". (R. 100).

[13] The present regulation was issued under the general terms of Rev. Stat. § 2478 (43 U.S.C. § 1201), which authorizes the Secretary by regulation to "enforce and carry into execution" the public land laws. It is settled, however, that that provision does not allow the Secretary to issue regulations which are "inconsistent with law", *United States* v. *Smull*, 236 U.S. 405, 409 (1915), or which "enlarge or curtail" statutory rights, *Payne* v. *Central Pac. Ry.*, 255 U.S. 228, 236 (1921).

lations, which as applied below upsets the rule of law settled by this Court, is void, and petitioner is entitled to the land he purchased.

II

Not only is the decision of the court below at war with the pronouncements of this Court, it allows an absurd and indefensible result in the administration of an important land disposal statute.

A measure of certainty is as desirable in transactions with the Government as in transactions between individuals. The rule of law adhered to for over a century has provided that certainty: when the price was paid the purchaser acquired a vested interest. The decision of the court below destroys that certainty: worse, it offers no substitute.

The Secretary's regulation provides that,

> "until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States."

No guidelines indicate the considerations which influence the Secretary in determining whether to issue a cash certificate. Nor is the time for its issuance limited.[14] Valu-

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[14] It was argued to the court below that the only sensible interpretation of the public sale regulations required the conclusion that § 250.5 was not applicable after a bidder had been declared to be "purchaser", as provided for by § 250.11. Such a construction of § 250.5 would restore a measure of certainty by giving effect to § 250.12(e), which provides:

> "When there has been full compliance with the regulations in this part, the manager will issue a cash certificate to the purchaser."

able rights, then, depend upon mere chance or whim. The present case is illustrative. As the Court of Appeals stated (App. 4a):

> "Although the Manager could properly have issued cash certificates to Willcoxson [on February 17, 1954, for one tract and January 31, 1955, for the other], he did not do so because of a heavy backlog of work in the Santa Fe Land Office."

If the administrative wheels had turned only a little faster, petitioner would have received his "cash certificates". Thus, in this case, substantial rights have been made to depend upon the work load of the local land office.

The absurdity of such a rule was recognized by this Court in 1892 when it held, in *Boyson Mining Co.* v. *Alta Mining Co.*, 145 U.S. 428, 431-32:

> "When the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the Land Department causes delay. But such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties."

The decision below violates this holding on two counts: (1) Just because of such delay in the "mere administration of affairs", petitioner has been denied the rights flowing from his purchase—the lands he paid for in 1953, and was declared to be the "purchaser" of, are taken from him in 1956 simply because the Manager's work load prevented him from getting around to issuing cash certificates; (2) Moreover, the effect of the delay is not to retain the lands for the United States, but to give them to third parties, the subsequent mining claimants, including Kerr-

McGee, for "if the lands are denied to petitioner, they become the property of those claimants."[15]

Such a bizarre result, in which a later private party is favored over an earlier one because of administrative happenstance, is neither fair nor sound policy. It should not be tolerated in any case, and it has no place in the administration of an important land disposal statute like the Isolated Tracts Act. That Act is the principal statute under which the public domain may be sold for cash. Realizing the Act's importance, Congress has expanded it over the years both as to the amounts and the kinds of land which can be sold under it.[16]

[15] In every real sense the controversy here is whether petitioner or the subsequent mining claimants will get the lands. If petitioner's rights are recognized, the subsequent mining claims fall, because the mining laws do not extend to lands in which the United States holds only legal title with the beneficial ownership being elsewhere. 43 CFR 185.1; 1 Lindley, *Mines* § 112 (3d ed. 1914); *Wyoming* v. *United States*, 255 U.S. 489 (1921).

On the other hand, if petitioner's rights are denied, the mining claimants will hold the lands under their claims. Contrary to the statement below (App. 8a, note 10), it makes no difference that the mining claimants have not sought legal title. They do not need to do so to protect their interests. It is undisputed that Kerr-McGee and those associated with it have been mining and removing minerals from one of the tracts without objection by the Government (R. 48-49). When a mining claimant makes discovery he has "an exclusive right of possession to the claim which is property in the fullest sense of the word", and he "need never apply for a patent". *United States* v. *Carkin*, 67 I.D. 417, 421 (1960), citing *Cole* v. *Ralph*, 252 U.S. 286, 295 (1920).

[16] Thus, the size of any single isolated or disconnected tract which can be sold, which was fixed at 160 acres in 1895 (28 Stat. 687), was successively increased to 320 acres in 1928 (45 Stat. 253), to 760 acres in 1934 (48 Stat. 1274), and to 1,520 acres in 1947 (61 Stat. 630). Since 1912 (37 Stat. 77), the Act has contained a proviso permitting the sale of land which "is mountainous or too rough for cultivation" even though it is not isolated or disconnected. By separate statutes, the Act has been made applicable to other kinds of lands in Oklahoma, Alabama, Minnesota, North Dakota and Montana. 43 U.S.C. §§ 1171a-1177 (1958).

Moreover, sales under the Isolated Tracts Act account for a substantial proportion of the revenues realized from disposals of the public domain. According to the annual reports of the Director of the Bureau of Land Management, sales at public auction during the five-year period ending June 30, 1962 accounted for 4.75 million of the 18.80 million acres of public land disposals, or 25 per cent. Moreover, the acreage sold at public auction during that period produced $5.65 million of the total $18.69 million of purchase money received by the Department from public land disposals—approximately 30 per cent.[17]

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

JOHN H. PICKERING
616 Transportation Building
Washington 6, D. C.

JOHN D. ROBB
First National Bank Building
Albuquerque, New Mexico

Counsel for Petitioner

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[17] See Table 15 of the Statistical Appendix to the Annual Reports of the Director of the Bureau of Land Management for the fiscal year ended June 30, 1958, and Table 16 of the Statistical Appendices for the fiscal years ending June 30, 1959-62.